ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

JEFFREY R. WRIGHT
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

D.W.,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 84A05-0612-JV-729
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable Matthew Headley, Special Judge
Cause No. 84C01-0409-JD-846

May 25, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, D.W., appeals the juvenile court's adjudication of him as a delinquent.

We affirm.

ISSUE

D.W. raises one issue on appeal, which we restate as: Whether the juvenile court abused its discretion in denying his motion for relief from judgment pursuant to Ind. Trial Rule 60(B), based on the argument that his counsel provided ineffective assistance by failing to investigate his alibi in violation of the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution.

FACTS AND PROCEDURAL HISTORY

On August 5, 2004, an unoccupied house was broken into at 4683 North Brighton Street in Terre Haute, Indiana. During the break-in, paint was thrown onto the floor, walls, and kitchen appliances. Additionally, doors and windows were broken. The total damage to the house exceeded $2,500.00. The sole eyewitness, K.S., eleven years old at the time, reported that she saw someone inside the residence, and that the person later came outside, cussed at her, and flicked paint on her. K.S. identified D.W. as the intruder.

On September 23, 2004, the State filed a delinquency petition alleging D.W. was delinquent for committing criminal mischief, which would be a Class B misdemeanor if committed by an adult, Ind. Code § 35-43-1-2. On May 26, 2005, the State amended its delinquency petition to reflect the allegation of criminal mischief as a Class D felony, if

committed by an adult. On July 29, 2005, the juvenile court held a fact-finding hearing. At its conclusion, the juvenile court found D.W. delinquent as charged in the amended petition. On September 1, 2005, the juvenile court held a dispositional hearing and committed D.W. to the Indiana Department of Correction.

On September 9, 2005, D.W.'s father filed a *pro se* notice of appeal. On December 6, 2005, this court dismissed the appeal without prejudice for the purpose of D.W. seeking relief from judgment in the trial court pursuant to Ind. Trial Rule 60(B). On September 29, 2006, the juvenile court held a hearing on D.W.'s T.R. 60(B) motion. On October 19, 2006, the juvenile court issued an Order denying the motion to set aside the adjudication of delinquency pursuant to T.R. 60(B), which stated, in pertinent part:

> . . . [T]here is a presumption that the lawyer's performance was within the norms. Moreover, trial tactics in of themselves do not establish ineffective assistance of counsel. Here, the attorney representing [D.W.] testified that he considered the alibi defense, but chose to attempt to discredit the [eyewitness] as part of his trial strategy, and to not call alibi witnesses. Apparently, the trial counsel thought that the original trial judge would not be swayed by family members vouching/testifying as to [D.W.'s] whereabouts, . . . compared to the [eyewitness], who claimed [D.W.] ran out of the damaged/defaced house and threw paint on her, as well as the house. Trial strategy shall not raise to the level of ineffective assistance of counsel unless the trial strategy fails to address a person's fundamental right, which is not alleged in this action.

(Appellant's Br. p. 22).

D.W. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

D.W. argues that the juvenile court improperly denied his T.R. 60(B) motion for relief from judgment. Specifically, D.W. claims that his trial counsel provided ineffective assistance because he failed to investigate and develop an alibi defense.

A motion for relief from judgment under T.R. 60(B) is addressed to the equitable discretion of the trial court. *In re Adoption of T.L.W.*, 835 N.E.2d 598, 600 (Ind. Ct. App. 2005). Therefore, we review a denial of such a motion for an abuse of discretion. *Id*. An abuse of discretion will be found only when the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. *Parham v. Parham*, 855 N.E.2d 722, 727 (Ind. Ct. App. 2006), *trans. denied*. In our review, we will not reweigh the evidence or substitute our judgment for that of the trial court. *T.L.W.*, 835 N.E.2d at 600. "On a motion for relief from judgment, the burden is on the movant to demonstrate that relief is both necessary and just." *Darling v. Martin*, 827 N.E.2d 1199, 1202 (Ind. Ct. App. 2005), *reh'g denied* (quoting *G.B. v. State*, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999)).

Trial Rule 60(B) provides in pertinent part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
>
> * * *
>
> (8) any reason justifying relief from the operation of the judgment . . .
>
> The motion shall be filed within a reasonable time . . . . [and] must allege a meritorious claim or defense.

Sub-paragraph (8) of T.R. 60(B) is an omnibus provision that gives broad equitable powers to the trial court in the exercise of its discretion. *Freshwater v. State*, 834 N.E.2d 1133, 1136 (Ind. Ct. App. 2005), *trans. denied*.

Thus, here, D.W. bases his motion for relief from judgment on T.R. 60(B)(8), contending that he was denied effective assistance from his trial counsel, as guaranteed under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Indiana Constitution. *See Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. The standard by which we review claims of ineffective assistance of counsel is well established. *Id*. In order to prevail on a claim of this nature, a defendant must satisfy a two-pronged test, showing that: (1) his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. (citing *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984), *reh'g denied*).

Counsel's performance is presumed effective, however, and a defendant must offer strong and convincing evidence to overcome this presumption. *Johnson*, 832 N.E.2d at 996. Moreover, we do not need to determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id*. To satisfy a showing of prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of proceeding would have been different. *Id*. at 996-97. Furthermore, we "will not speculate as to what may or may not have been advantageous trial strategy as counsel

should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best." *Id*. at 997 (quoting *Whitener v. State*, 696 N.E.2d 40, 42 (Ind. 1998)).

Here, D.W. avers that his trial counsel did not conduct a reasonable investigation of his alibi defense. Specifically, D.W. faults his counsel for not personally investigating the time of the offense, the validity of his alibi, and the merits of presenting this additional defense. In addition, D.W. claims it was deficient for his counsel to not use an investigator in preparing the case for trial. We initially observe that when deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgment. *See Parish v. State*, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005), *reh'g denied*. Also, we note this observation by the Supreme Court in *Strickland*:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland, 466 U.S. at 690-91.

Our review of the record before us reveals that at the T.R. 60(B) hearing, D.W.'s counsel testified that D.W. advised him of a potential alibi defense; and, while not entirely certain, that D.W.'s aunt had also advised him she was with D.W. at the time of the delinquent act. Additionally, D.W.'s counsel testified that he did not follow up on the alibi defense, likely because he had concerns that the alibi testimony would conflict with

testimony by the eyewitness; thus, he explained that an alibi defense was not the avenue he wanted to pursue. Nonetheless, D.W. now alleges it was unreasonable for his counsel to not at least investigate whether the potential alibi testimony would be consistent or inconsistent with the eyewitness's testimony.

However, our review of the record suggests that D.W.'s counsel did investigate, and even attempt to present an alibi defense. Specifically, the record shows that he called D.W.'s aunt, Joyce Wykoff (Joyce), as a defense witness at the fact finding hearing, and questioned her about her activities on the day the break-in occurred. Joyce testified that on the afternoon of the break-in, she went to Illinois, along with D.W. and some other children. Yet because D.W.'s counsel had not filed an alibi notice, the juvenile court struck that portion of Joyce's testimony wherein she stated what time she returned from Illinois. *See* I.C. §§ 35-36-4-1 and 35-36-4-3; *see also* I.C. § 31-32-1-1 ("procedures governing criminal trials apply in all matters not covered by the juvenile law"), *D.D.K v. State*, 750 N.E2d 885, 889 (Ind. Ct. App. 2001). Although D.W.'s counsel swore to the juvenile court he was not using Joyce as an alibi witness, as the juvenile court opined, we cannot fathom any other reason he would have had Joyce testify. Thus, we can agree with D.W. to the extent that perhaps his counsel did not use his best judgment in failing to file an alibi notice prior to trial. Yet, despite this arguable error in judgment, we do not find that trial counsel's representation of D.W. rose to the level of ineffective.

Further review of the record discloses that D.W.'s counsel cross-examined and re-cross-examined the State's eyewitness at the fact-finding hearing. Counsel's choice to try to discredit the one eyewitness, instead of focus on D.W.'s potential alibi, is a

strategic decision that we will not second-guess. As previously stated, it is not our job to speculate as to what may or may not have been advantageous trial strategy. *See Johnson*, 832 N.E.2d at 997. Rather, counsel has the discretion to determine what strategy is best under the circumstances. *Id*. Moreover, as the State's eyewitness testified that she saw D.W. that afternoon in the yard of the house where the break-in occurred, there is not a reasonable probability that the result of the proceeding would have been different, had Joyce's alibi testimony been fully admitted. Therefore, we conclude that the juvenile court did not abuse its discretion in denying D.W.'s T.R. 60(B) motion for relief from judgment.

CONCLUSION

Based on the foregoing, we conclude the juvenile court properly denied D.W.'s T.R. 60(B) motion, as we find that D.W. received effective assistance of counsel.

Affirmed.

BARNES, J., concurs.

NAJAM, J., concurs in result.